

### REMARKS

Claims 11-15 and 108-115 are currently pending in this application. Claims 11-15 and 108-115 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 4-7 and 9-20 of U.S. Patent No. 6,734,455 ('455 patent). This rejection is respectfully traversed.

Applicant respectfully submits that the '331 application is not a valid reference. 35 U.S.C. § 121 "prohibits the use of a patent issuing on an application with respect to which a requirement for restriction has been made, or on an application filed as a result of such a requirement, as a reference against any divisional application, if the divisional application is filed before the issuance of the patent." M.P.E.P. § 804.01. The present application is a divisional application that claims priority to Application No. 09/809,331 (the '331 application) from which the '455 patent issued. The present application was filed on January 16, 2004, prior to the issuance of the '455 patent on May 11, 2004, and in response to an Election Requirement made in the '331 application.

During the prosecution of the '331 application, the examiner issued an Election of Species Requirement dated July 29, 2003, noting that the '331 application contained three patentably distinct species: a) an integrated circuit device prepared by a process comprising at least diffusing a second layer into a first layer to create an integral layer; b) an integrated circuit device comprising a bottom layer, an active chalcogenide layer formed over the bottom layer, and a top layer having an rms surface roughness of less than 140 angstroms; and c) a chalcogenide integrated circuit device comprising a bottom layer, a chalcogenide layer, a metal layer over the chalcogenide layer and a transparent barrier layer over the metal layer. In response to the Election Requirement in the '331 application, Applicant elected Species b, claims 1-10, 16, 51-61, 77-107 and 116-123, which issued without further amendment. Prior to the issuance of

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the '455 patent, the present application was filed in response to the Election Requirement. Thus, the '455 patent is not a valid reference.

For at least these reasons, Applicant requests the withdrawal of this rejection and the allowance of the pending claims.

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Respectfully submitted,

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